Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	**CG Docket No. 02-278**
	)	
	)	**CG Docket No. 05-338**
Petition for Expedited Declaratory Ruling of M3 USA Corporation	)	

COMMENTS OF J.D. POWER

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I. INTRODUCTION

On behalf of J.D. Power, we are writing to express our support for the petition for declaratory ruling filed on March 20, 2017 by M3 USA Corporation (the "Petitioner"), requesting that the Federal Communications Commission (the "Commission") clarify "that research survey invitations do not constitute 'advertisements' under the Telephone Consumer Protection Act" (the "TCPA").

For almost fifty years, J.D. Power has been a global leader in the area of market research and data analytics. Our aim is to amplify the voice of the consumer, provide actionable insights to our clients, and to help brands improve the overall quality of their products and services. As a trusted, objective source of information, it is critical that we strive to uphold the highest standards of the market research industry.

As is described in more detail herein, the line between market research and marketing is taken very seriously, and something our industry polices closely. If consumers suspect legitimate research work is merely a pretext to direct sales and marketing, the ability to conduct meaningful market research will be materially eroded — and along with it, the business model of every reputable market research firm.

Continued guidance from the Commission on these important issues is therefore critical to the market research and data analytics industry. Indeed, given the vital role market research survey work plays in the economy, it is critical to business in the U.S. in general. Accordingly, we appreciate the opportunity to comment.

II. THERE IS NO PRESUMPTION THAT FAXES ARE PRETEXTS FOR ADVERTISEMENTS WHEN SENT BY FOR-PROFIT BUSINESSES.

As the Petitioner has noted, the Commission has already held that neither company logos nor incidental advertising are sufficient, under the TCPA, to convert a fax into an advertisement;[1] that purely informational faxes sent by for-profit companies are not actionable under the TCPA;[2] and that surveys, whether by fax or by telephone, are not advertisements unless they are mere

[1] *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd. 3787, ¶ 51 (2006) (*"Junk Fax Order"*).
[2] *Id.* at 3814, ¶ 53.

"pretext."[3] Additionally, the Commission has recognized that "surveys [and] market research" are not precluded by the national do-not-call list;[4] that responding to a survey invitation does not form the basis for an established business relationship;[5] that, in contrast to telemarketing calls, "research or survey calls" do not require prior consent when placed to residential telephone lines;[6] and, most recently, that "survey, opinion and marketing research" are distinct from telemarketing as they relate to robocalls.[7]

In short, the Commission's guidance to date has consistently delineated market research and marketing, and clearly marked out "pretextual" communications as distinct from legitimate market research. This guidance has provided a viable framework consistent with Congressional intent regarding the TCPA.[8]

The Commission's lack of guidance on the term "pretext," however, has created confusion in the courts and resulted in a surge of expensive litigation grounded in conjecture. Now, as the Petitioner has explained, the Second Circuit has articulated a position that allows litigants to argue that there is a presumption that any fax sent by a for-profit company is a pretext

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[3] *Id.* at 3815, ¶ 54; *see also In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14039, ¶ 37 n. 141 (2003) (*"2003 Order"*).
[4] *Id.* at 14039, ¶ 37.
[5] *Id.* at 14039, ¶ 47, n. 141; *see also id.* at 14080, ¶ 114 n. 365 ("there is no reason for a customer who merely inquires about a product or service, or answers a survey, to be subject to future telemarketing calls") (quoting comments of the Texas Office of Public Utility Counsel).
[6] *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830, 1841, ¶ 28 (2012) (*"2012 Order"*).
[7] *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8038, ¶ 160, n. 543 (2015) (*"2015 Order"*) ("We recognize the concern of MRA that consumers who use blocking technology will not only block unlawful robocalls but 'will potentially block all manner of non-telemarketing telephone calls, including calls for survey, opinion and marketing research purposes.'").
[8] *See* H.R. REP. NO. 102-317 at 13 ("[T]he Committee does not intend the term 'telephone solicitation' to include public opinion polling, consumer or market surveys, or other survey research conducted by telephone.").

to marketing and sales.[9] Specifically, the Second Circuit has observed that "[b]usinesses are always eager to promote their wares and usually do not fund presentations for no business purpose."[10] This is undoubtedly true, but there are any number of "business purposes" ancillary to, and wholly distinct from, advertising and sales. The Second Circuit appears not to have considered the legitimate consumer survey business purpose in its broad and terse treatment of the issue.

The Second Circuit's simplistic conception of the profit motive's effect on communications certainly does not describe the nature of survey work. Although there are bad actors who abuse the trust of consumers and use surveys as pretexts to direct sales and marketing, these "researchers" are the exception, not the rule, and do not represent our industry. The activities of these bad actors are known as "sales under the guise of research," or "sugging" for short, and are specifically banned by the Federal Trade Commission's Telemarketing Sales Rule,[11] a ban for which the market research industry actively lobbied.[12] Furthermore, both of our industry's primary ethics codes prohibit sugging. The ethics code of the Marketing Research Association (the "MRA") states:

> Conducting commercial or political activities under the guise of opinion and marketing research undermines public trust in the profession and erodes the goodwill that makes research possible. Our industry works hard to guard its reputation. These non-research activities include, but are not limited to … [s]ales or promotional approaches to the respondent.[13]

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[9] *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92, 95-96 (2d Cir. 2017).
[10] *Id.*
[11] The Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq*.
[12] *See* Diane K. Bowers, *Sugging Banned at Last*, MARKETING RESEARCH, Vol. 7 No. 4, 40 (Fall 1995) ("With support from the Direct Marketing Association and the National Association of Attorneys General, the Council for Marketing and Opinion Research (CMOR) succeeded in having an amendment approved to prevent 'sugging' (selling under the guise of research).").
[13] *MRA Code of Marketing Research Standards*, THE MARKETING RESEARCH ASSOCIATION, 3, ¶ 10 (October 2013), *available at* http://www.insightsassociation.org/sites/default/files/misc_files/mra_code.pdf.

Similarly, the ethics code of the Council of American Survey Research Organizations ("CASRO") provides that "[d]eceptive practices and misrepresentation, such as using research as a guise for sales or solicitation purposes, are expressly prohibited."[14] Our trade associations not only expel members who are caught sugging, but also encourage members to report violating non-members to the public and relevant authorities.[15]

The essential fact we want to press to the Commission is this: legitimate market research surveys *do not at any point in time* result in direct marketing and sales to survey-takers by market research firms. The Second Circuit's conclusion that any fax from a for-profit company is a pretext to advertisement, regardless of the company's relationship to the fax recipient, obviates the need for a "pretext" exception in the first place, and is not in accord with the Commission's correct understanding of survey work as expressed in its prior rulings.

III. MARKET RESEARCH SURVEYS DO NOT CONSTITUTE PROPERTY, GOODS OR SERVICES VIS-À-VIS THE PERSONS TAKING THE SURVEYS.

Much of the confusion seems to stem from a fundamental misunderstanding of the relationships between market research firms, the firms' corporate clients, and survey-takers. It is true, as the Second Circuit has noted, that all businesses seek a profit, and like all businesses market research firms do, of course, advertise and market their services.

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[14] *Code of Standards and Ethics for Market, Opinion, and Social Research,* COUNCIL OF AMERICAN SURVEY RESEARCH ORGANIZATIONS, 8, ¶ 2(b) (September 2013), *available at* http://www.insightsassociation.org/sites/default/files/misc_files/casro_code_of_standards.pdf. In January 2017, the MRA and CASRO merged to form the Insights Association. Until Insights Association publishes a new code of ethics, expected in late 2017, former members of the MRA and CASRO remain bound by their respective codes.

[15] *See* LaToya Lang, *Sugging by Caribbean Cruise Line*, INSIGHTS ASSOCIATION (Mar. 20, 2013), *available at* http://www.insightsassociation.org/article/sugging-caribbean-cruise-line.

But these "sales" functions are not directed at individual consumers; they are directed at the corporate clients on whose behalf we conduct research. In contrast to the Second Circuit's reasoning in *Boehringer*, the Sixth Circuit's decision in *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.* offers a better, more thorough examination of the profit motive: "[T]he record instead shows that the faxes list the drugs in a purely informational, non-pecuniary sense: to inform Sandusky what drugs its patients might prefer, based on Medco's formulary—*a paid service already rendered not to Sandusky but to Medco's clients.*"[16] In similar cases against market research firms the plaintiffs' bar has frequently glossed over this basic fact: though survey invitations do serve a "business purpose," a legitimate market research firm is rendering services to the corporate client, *not* the survey-taker.

As discussed above, we are aware of abuses by marketers posing as "researchers," and not only endorse but *actively participate* in the censure of these illegitimate activities. Here, the Petitioner is merely asking for a clarification from the Commission, consistent with its prior rulings and the fundamental nature of market research, that a survey is not a "property, good or service" vis-à-vis the recipient of the survey invitation.

IV. INVITATIONS TO PARTICIPATE IN MARKET RESEARCH SURVEYS ARE NOT ADVERTISEMENTS UNLESS COMMERCIALLY AVAILABLE PROPERTY, GOODS OR SERVICES ARE PROMOTED IN THE FAX ITSELF OR DURING THE SURVEY ITSELF.

The considerations discussed above also counsel in favor of a ruling that invitations to participate in a survey are not advertisements when they do not promote commercially available goods or services in an invitation or during a survey. As discussed above, this is never the case with legitimate market researchers. While researchers frequently offer inducements to participate

[16] *See* 788 F.3d 218, 222 (6th Cir. 2015) (emphasis added).

in surveys in the form of cash or other "prizes," this is done only to ensure robust participation, a fact implicit in the Commission's repeated delineation of market research as distinct from standard commercial transactions. In *Phillips Randolph Enters., LLC v. Adler-Weiner Research Chi., Inc.*, for example, a federal court in Illinois declined to construe a survey invitation as an advertisement under the TCPA, despite the defendant market research firm offering $200 cash for participating.[17] Although the fax in *Phillips Randolph* informed recipients of the honorarium in all capital letters, and set off by asterisks, the court explicitly rejected the plaintiff's argument that a fax can advertise a "service" in the form of a "research discussion," concluding that, "on its face, the fax does not promote a 'commercially available service,' but a research study."[18]

Similarly, in *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc., et al.*, a federal court in Michigan dismissed an argument that a fax "was sent to Plaintiff with the goal of ultimately making profit," noting that "[t]he Fax does not offer-or even mention-any product, good, or service to Plaintiff, nor does it not offer or solicit any product, good, or service for sale."[19] As the court noted, this reasoning is consistent with the Commission's own definition of "advertisement," which contemplates "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars."[20]

The Commission should point other courts in the same direction. A simple, common-sense requirement that survey invitations are not advertisements when they do not actually promote commercially available goods or services is not only consistent with the Commission's

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[17] *See* 526 F. Supp. 2d 851 (N.D. Ill. 2007).
[18] *Id.* at 853.
[19] No. 16-cv-13777, 2017 WL 783499 (E.D. Mich. Mar. 1, 2017).
[20] *Id.* at *5 (quoting *Junk Fax Order* at 3814, ¶ 52); *see also Medco*, 788 F.3d at 222 ("Under the Act's definition, and in everyday speak, these faxes are therefore not advertisements: They lack the commercial components inherent in ads.").

prior rulings, its adoption by the Commission would also go a long way towards clearing up confusion and returning a measure of sanity to TCPA litigation.

V. CONCLUSION

The need for clear guidance from the Commission on these issues is urgent. As reported by the U.S. Chamber of Commerce's Institute for Legal Reform, TCPA litigation nearly doubled between 2013 and 2015.[21] This trend has shown no signs of slowing.[22] As the Petitioner notes, this deluge of abusive litigation has chilled legitimate survey work — work which is designed to benefit both businesses and consumers. If the simplistic view of the profit motive adopted by the Second Circuit and peddled cynically by the plaintiff's bar are allowed to become the *starting point* in any TCPA litigation, an already out-of-control situation will be made even worse.

In conclusion, we support the Petitioner's request for additional clarity. Rulings from the Commission that there is no presumption faxes from for-profit companies are pretexts to advertisement, that market research surveys are not goods and services vis-à-vis the survey-taker, and that legitimate survey invitations are not advertisements would be consistent with the Commission's long-running position on market research, and firmly grounded in the realities of our industry.

We thank the Commission again for the opportunity to comment, and respectfully request that the Petitioner's recommendations be adopted.

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[21] *Analysis: TCPA Litigation Skyrockets Since 2007; Almost Doubles Since 2013*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, Feb. 5, 2016, http://www.instituteforlegalreform.com/resource/analysis-tcpa-litigation-skyrockets-since-2007-almost-doubles-since-2013?utm_medium=Email&utm_source=ExactTarget&utm_campaign=&utm_content=.

[22] *Year in Review: Consumer Litigation Filings End 2016 with Surge in TCPA Cases*, ACA INTERNATIONAL, Jan. 26, 2017, https://www.acainternational.org/news/year-in-review-consumer-litigation-filings-end-2016-with-surge-in-tcpa-cases.